

05-1035
Sales and Use Refund Request
Signed 04/23/2007

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,)	FINDINGS OF FACT, CONCLUSIONS
)	OF LAW, AND FINAL DECISION
Petitioner,)	
)	
v.)) Appeal No. 05-1035
)	
TAXPAYER SERVICES DIVISION,)) Tax Type: Sales and Use
UTAH STATE TAX COMMISSION,)) Refund Request
)) Tax Period: 04/02-08/02
Respondent.)) Judge: Phan
)	

Presiding:

Bruce Johnson, Commissioner
Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REPRESENTATIVE 1, Attorney at Law
 PETITIONER REPRESENTATIVE 2
For Respondent: RESPONDENT REPRESENTATIVE 1, Assistant Attorney General
 RESPONDENT REPRESENTATIVE 2, Assistant Director, Taxpayer Services
 Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on January 10, 2007. Petitioner is appealing Respondent's denial of a refund request. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. Petitioner had filed a request on December 6, 2004, for a refund of sales tax paid in the period from April through August of 2002. The amount of the refund requested was \$\$\$\$\$. At the Formal Hearing Petitioner modified the refund claim to \$\$\$\$\$ in sales tax. In a Statutory Notice dated June 7, 2005, Respondent denied the refund request. Petitioner has timely filed an appeal of the denial.

2. The refund request was for sales tax paid by Petitioner to various vendors as Petitioner

purchased materials which Petitioner then used in the construction of concrete traffic barriers.

3. Petitioner manufactures, installs or positions, and repairs concrete products, including concrete barriers.

4. In January 2002, Petitioner entered into a subcontracting agreement with COMPANY A (“the Subcontract”). COMPANY A was the general contractor on a project for the COMPANY B (“COMPANY B”). Section 5.8 of the Subcontract provides in part that, “[T]itle to all Work, materials and equipment covered by an application for payment will pass to the [COMPANY B] upon the first to occur of either incorporation in the construction or upon the receipt of payment . . .”

5. COMPANY B is an institution or political subdivision of the State of Utah.

6. In the Subcontract, Petitioner agreed to manufacture and position precast concrete barriers for a stretch of HIGHWAY in CITY. The barriers Petitioner manufactured for the project were primarily constant slope barriers. However, a small portion of the contract required the manufacture and positioning of some transition sections. It is the sales tax Petitioner paid on the materials purchased to manufacture these constant slope and transition barriers that is at issue in the refund request.

7. Petitioner delivered the barriers directly to COMPANY B by positioning the barriers along the roadway, they were never in the possession or control of COMPANY A. However, the general contract was between COMPANY B and COMPANY A. It was COMPANY A that paid Petitioner for the concrete barriers and the positioning of the barriers.

8. Petitioner paid the sales tax on the materials it purchased to make the barriers and did not supply the various vendors with an exemption certificate. Petitioner did not obtain an exemption certificate from COMPANY A. Petitioner did provide an exemption certificate from COMPANY B, but it had not been issued until 2004.

9. The precast constant slope barriers at issue are constructed of concrete and steel. They are 20 feet long, 42 inches tall, 24 inches wide at the base and 8 inches wide at the top. These are the standard specifications for the barriers, and these types of barriers have been used at other locations along the roadways. In fact subsequent to the period at issue, Petitioner has manufactured constant slope barriers with these same specifications for other projects. The constant slope barriers are cast individually by placing reinforced steel in a metal form built to specifications and pouring concrete over the steel to fill the form. After the concrete has hardened, the precast barriers are removed from the forms and are ready to be shipped to the customer. They weigh approximately 13,800 pounds.

10. The constant slope barriers are manufactured with metal loops protruding from the ends of each barrier. When the barriers are placed end to end, the loops overlap. Adjacent barriers are connected to each other by inserting a steel rod vertically into the overlapping loops. Petitioner positioned the subject constant slope barriers along the HIGHWAY in the CITY project using a crane to set the barriers end to end along the roadside and hook them together for stability using the steel rod through the loop system. The process of placing the barriers along the road took approximately 2 to 5 minutes per barrier. The barriers are free standing on the shoulder surface of the roadway. They were only attached to each other with the vertical rod system and were not attached to the road surface, nor were they attached to the ground.

11. Removal or repositioning of the barriers requires the removal of the steel rod from between the two sections and the use of a crane to lift the barrier onto a truck or to a new location. Again this would take approximately 2 to 5 minutes. There is no damage to the roadway from the barrier itself and no damage to the barrier. There is a slight risk of damage to the roadway from the weight of the crane if the asphalt is new or the temperatures very warm.

12. COMPANY B used the constant slope barriers at issue to replace aging guardrail. The old

guardrail consisted of metal beams bolted to wooden posts, which were driven into the ground and attached to the roadway.

13. COMPANY B representatives testified that COMPANY B's options were to replace the old barrier with either the constant slope barrier or cast-in-place barrier, both having similar costs. Cast in place barrier is permanently affixed to the roadway, so once it is poured in its position on the roadway, it cannot be repositioned. Instead of cast-in-place barrier, COMPANY B chose to use the constant slope barrier specifically because COMPANY B would be widening the road in the future and it was known at the time of the purchase that the barriers would have to be moved during the course of the road-widening project. The fact that the constant slope barrier could be moved around without damage to the barrier or the road was important to COMPANY B in its decision to purchase this type of barrier. The plan was to use the constant slope barrier along HIGHWAY on a long-term basis, but with the understanding that it would be moved to new locations as needed. Another reason COMPANY B chose this type of barrier, according to the testimony of the COMPANY B representative was that it was easy to replace damaged sections of barrier.

14. While the cost charged by Petitioner for the constant slope barrier was approximately \$\$\$\$ per foot, the cost Petitioner charged for the positioning of the barrier was only approximately \$\$\$\$ per square foot.

15. A different type of barrier, known as "Jersey Barrier" is smaller and lighter and generally used for temporary traffic control during construction projects. COMPANY B has stockpiles of this type of barrier.

16. As of the date of the Formal Hearing at least 40% of the constant slope barrier at issue has been moved to a location different from where it had originally been positioned by Petitioner. Also some sections of the barrier that were damaged have been replaced.

APPLICABLE LAW

1. A tax is imposed on the purchaser as provided in this part for amounts paid or charged for the following transactions: (a) retail sales of tangible personal property made within the state. (Utah Code Ann. Sec. 59-12-103(1) (2002)¹.)

2. The following sales and uses are exempt from the taxes imposed by this chapter: . . . (2) sale to the state, its institutions, and its political subdivisions; however, this exemption does not apply to sales of : (a) construction materials . . . (26) property purchased for resale in this state, in the regular course of business, either in its original form or as an ingredient or component part of a manufactured or compounded product; . . . (Utah Code Ann. 59-12-104(2) & (26) (2002).)

3. “Construction materials” means any tangible personal property that will be converted into real property. (Utah Code Ann. Sec. 59-12-102(8) (2002).)

4. A taxpayer may obtain a refund under this Subsection (2) of a tax paid under this chapter on a transaction that is taxable under Section 59-12-103 if: (i) the sale or use was exempt from sales and use taxes under Section 59-12-104 on the date of the purchase; and (ii) except as provided in Subsection (2)(c) the taxpayer files a claim for a refund with the commission as provided in Subsections (2)(b) through (d). (Utah Code Sec. 59-12-110 (3)(e).)

5. Sales of construction materials and other items of tangible personal property to real property contractors and repairmen of real property are generally subject to tax if the contractor or repairman converts the materials or items to real property. (1) “Construction materials” include items of tangible personal property such as lumber, bricks, nails and cement that are used to construct buildings, structures or improvements on the

¹ Statutes in the Sales and Use Tax Act and Administrative Rules have been both revised and renumbered since the period at issue. In this order the Commission cites to the statutes and rules in affect during the relevant period.

land and typically lose their separate identity as personal property once incorporated into the real property . . .
(Utah Admin. Rule R865-19S-58(A) (2002).)

6. This rule does not apply to contracts where the retailer sells and installs personal property that does not become part of the real property. Examples of items that remain tangible personal property are: 1) moveable items that are attached to real property merely for stability or for an obvious temporary purpose; . . .
(Utah Admin. Rule R865-19S-58(E) (2002).)

7. Taxpayers selling tangible personal property or services to customers exempt from sales tax are required to keep records verifying the nontaxable status of those sales. Records shall include: 1. sales invoices showing the name and identity of the customer; and 2. exemption certificate for exempt sales of tangible personal property or services if the exemption category is shown on the exemption certificate forms.
(Utah Admin. Rule R865-19-23(A) (2002).)

8. A vendor may retain a copy of a purchase order, check, or voucher in place of the exemption certificate as evidence of exemption for a federal, state, or local government entity including public schools.
(Utah Admin. Rule R865-19S-23 (C) (2002).)

9. The burden of proving that a sale is for resale or otherwise exempt is upon the vendor. If any agent of the Tax Commission requests the vendor to produce a valid exemption certificate or other similar acceptable evidence to support the vendor's claim that a sale is for resale or otherwise exempt and the vendor is unable to comply, the sale will be considered taxable and the tax shall be payable by the vendor. (Utah Admin. R865-19S-23(E).)

10. Sales made to the state of Utah, its departments and institutions, or to its political subdivisions such as counties, municipalities, school districts, drainage districts, irrigation districts, and metropolitan water

districts are exempt from tax if the purchase is for use in the exercise of an essential governmental function. (Utah Admin. Rule R865-19S-42(A) (2002).)

11. A sale is considered made to the state, its department and institutions, or to its political subdivisions if the purchase is paid for directly by the purchasing state or local entity. If an employee of a state or local entity pays for a purchase with his own funds and is reimbursed by the state or local entity, that sale is not made to the state or local entity and does not qualify for the exemption. (Utah Admin. Rule R865-19S-42(B) (2002).)

12. In *Nickerson Pump & Machinery Co. v. State Tax Comm'n*, 361 P.2d 520, at 522 (1961) the Utah Supreme Court set out a test to determine whether an item remained personal property or became part of the real property. The factors the Court considered in that case were: 1) the pumps were removable without harm to the structures on which they were placed; 2) the pumps were manufactured with the idea that they could be used at different locations; 3) the parties contemplated that the pumps would be removed for repairs or replacement; 4) the primary purpose of the sales agreements was the sale and purchase of the pumps assembled according to specifications and the installation of the pumps was merely incidental to that purpose; 5) the installation was for the convenience of the purchaser because of the great weight of the pumps; and 6) the sales agreement did not indicate that the pumps were intended to be treated as real property upon installation.

CONCLUSIONS OF LAW

1. It is clear from applying the facts to the law, the constant slope barrier was not converted to real property and remained tangible personal property. It was not physically attached to the roadway, it could be moved and repositioned without damage to either the barrier or the roadway.

2. As the constant slope barriers remained tangible personal property, after manufacturing the

barriers, Petitioner sold the barriers as items of tangible personal property. Therefore, the materials that Petitioner purchased to use as ingredients or component parts in the construction of the barriers were items purchased for resale and were exempt from sales tax pursuant to Utah Code Sec. 59-12-104(26) (2002).

3. Utah Admin. Rule R865-19S-91 (2002) clarified that when the government entity makes a direct payment to the vendor for the tangible personal property or services, the sale is made to the government entity. In this case, although Petitioner did deliver the barriers directly to COMPANY B, COMPANY B did not pay Petitioner for the barriers. COMPANY A paid Petitioner for the barriers. The transaction for the sale of the completed barriers between Petitioner and COMPANY A is exempt from sales tax as a purchase for resale pursuant to Utah Code Sec. 59-12-104(26) (2002).

4. Utah Code Sec. 59-12-110(3)(e) provides that taxpayers may request a refund of taxes overpaid. The statutes contemplate that if a taxpayer makes an error and pays sales tax on items that are exempt, they may later request a refund. As far as the failure to obtain exemption certificates, Utah Admin. Rule R865-19S-23 (E) (2002) contemplates that the taxpayer can support its claim that a sale was for resale or otherwise exempt with evidence other than an exemption certificate. Petitioner has provided evidence that the transactions at issue were exempt from sales or use tax.

DISCUSSION

There are two different sets of transactions for the Commission to consider in this matter that potentially could be subject to sales tax. The first are the transactions directly concerned in Petitioner's refund request, Petitioner's purchases of the materials Petitioner used to construct the constant slope barriers. Petitioner paid \$\$\$\$ in sales tax at the time it purchased these materials and asks that the tax be refunded. The second set of transactions are raised by Respondent, that being the transactions between Petitioner and the purchaser of the finished constant slope barrier. Respondent argues that if Petitioner did not owe sales tax on

the materials purchased to make the barriers because the barriers remained tangible personal property, then Petitioner should have collected and remitted sales tax when it sold the completed barriers.

The Commission first considers the transactions between Petitioner and its suppliers. Petitioner purchased materials to be used in the manufacturer of the constant slope barriers and paid sales tax at the time of the purchases, as should be done if Petitioner were going to install the barriers in such a manner that they become part of the real property. Petitioner later concluded that it would not be required to pay sales tax on the materials because the barriers remained tangible personal property and never became part of the real property.

Upon review of the facts and arguments in this case, it is clear to the Commission that the constant slope barrier was not converted to real property and remained tangible personal property. It was not physically attached to the roadway, it could be moved and repositioned without damage to either the barrier or the roadway and COMPANY B specifically chose the type of barrier because COMPANY B would be able to move it as needed when the planned road-widening project commenced. Utah Admin. Rule R865-19S-58 (2002) clarifies when items become incorporated into the real property or remain tangible personal property. Additionally, considering the six factors listed by the Court in *Nickerson Pump* at 522, it is apparent that the constant slope barriers remained tangible personal property. Applying the *Nickerson Pump* test to the facts in this matter the Commission finds the following: 1) the barrier is removable without harm to the barrier or the roadway; 2) the barrier was of the type that may be used at different locations; 3) the parties contemplated that the barriers would be moved and individual damaged barriers would be replaced; 4) the primary focus of the transaction was the acquisition of the barriers as indicated by the fact that the cost charged for the positioning of the barriers was a fraction of the cost for the barriers themselves; 5) COMPANY B could have positioned the barriers or had someone else perform this work; and 6) the contract itself was not dispositive of this issue.

Our decision in this matter is also supported by principles of sound administration and compliance. The Division's position would essentially require a contractor or supplier, such as Petitioner, to discern the COMPANY B's intent for particular barriers on particular projects. Jersey barriers, though not the subject of this appeal, are used for many of the same purposes as constant slope barriers. They are also used for temporary traffic flow during construction. Thus, there are many situations where the Division would presumably agree that jersey barriers remain tangible personal property. Under the Division's rationale, however, which particular jersey barriers are tangible personal property and which become real property may vary within a single contract and may even vary over the course of a contract, even though there is no difference in product itself or its method of attachment to the roadway. Tax treatment would vary as the purchaser's intent changes. In our view, it enhances tax compliance and sound administration to find that jersey barriers are always tangible personal property and that cast-in-place barriers are always real property. Constant slope barriers are more akin to jersey barriers, both in use, structure, and method of attachment. Thus, they should be treated as personal property as well, as long as their method of placement is consistent with the methods used in this case.

The Commission next considers Respondent's argument regarding the second set of transactions in this matter, Petitioner's sale of the completed barrier to the purchaser. Respondent argues if the constant slope barrier remained tangible personal property, then Petitioner should have collected and reemitted to the state sales tax when it sold the barrier to the purchaser, or provided an exemption certificate. There was considerable discussion between the parties on whether the purchaser of the constant slope barriers was COMPANY B, or whether the purchaser was COMPANY A. Utah Admin. Rule R865-19S-91 clarifies that when the government entity makes a direct payment to the vendor for the tangible personal property or services, the sales is made to the government entity. In this case, although Petitioner did deliver the barriers

directly to COMPANY B, COMPANY B did not pay Petitioner for the barriers. The barriers were part of a general contract with COMPANY A. COMPANY A subcontracted for the barriers from Petitioner and COMPANY A paid Petitioner for the barriers.

However, whether the purchaser was COMPANY B or the purchaser was COMPANY A is immaterial to the refund request before the Commission. If the transaction for the sale of the completed barriers was between Petitioner and COMPANY A it would exempt from sales tax as a purchase for resale pursuant to Utah Code Sec. 59-12-104(26) (2002). If the transaction for the sale of the completed barriers had been between Petitioner and COMPANY B it would be exempt as a sale to the state, its institutions or political subdivisions pursuant to Utah Code Sec. 59-12-104(2) (2002).

Respondent argues that Petitioner should not be allowed to claim a refund because Petitioner has not provided exemption certificates acceptable to Respondent. On the first set of transactions Petitioner paid sales tax at the time it purchased the materials, rather than provide exemption certificates to the vendors and request that the transactions be treated as tax-free purchases. For the second set of transactions, when Petitioner delivered the constant slope barrier and received payment, Petitioner did not obtain an exemption certificate from COMPANY A or COMPANY B and did not collect sales tax on the transaction. At the time these transactions occurred Petitioner had treated them essentially as they should have treated an item of tangible personal property that Petitioner installed and converted to real property. Later, two years after the period at issue, Petitioner did obtain an exemption certificate from COMPANY B. Respondent argues that Petitioner's failure to treat these original transactions correctly for tax purposes or obtaining exemption certificates at the time of the transactions precludes Petitioner from being able to obtain a refund of the taxes overpaid.

The Commission disagrees with Respondent on this point. Utah Code Sec. 59-12-110(2)(e)

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provides that taxpayers may request a refund of taxes overpaid and specifically refers to this situation where the sales were exempt from sales and use tax under Utah Code Sec. 59-12-104. Petitioner may request a refund if the transaction was exempt from tax as long as the request is filed within the statutory period.

Considering the argument that Petitioner is not entitled to the refund because it did not obtain appropriate exemption certificates at the time of the transactions, Utah Admin. Rule R865-19S-23 (E) (2002) contemplates that the taxpayer can support its claim that a sale was for resale or otherwise exempt with evidence other than an exemption certificate.

In the case before the Commission there is no factual dispute regarding the transactions themselves. All the barrier at issue was delivered to COMPANY B. COMPANY A paid for all the barrier. The contracts establish how much barrier was delivered. The invoices indicate how much material went into the construction of the barrier at issue. This matter is distinguishable from the more typical audit situation where a retailer had a stockpile of goods that were sold to numerous buyers, some of them exempt and some not. Exemption certificates and other specific documentation tying the exemption to the particular items sold is necessary. In this matter all of the constant slope barrier at issue was sold to one entity and all were exempt transactions. Respondent did not claim that some of this barrier was sold to other purchasers, nor did Respondent refute that all the barrier was delivered to COMPANY B, but paid for by COMPANY A. Respondent argues for a different legal conclusion from facts that are not in dispute. However, the Commission concludes that Petitioner has submitted sufficient evidence and documentation to support its contention in this matter that its purchase of materials and subsequent sales of the barrier were exempt from sales and use tax pursuant to Utah Code Sec. 59-12-104.

DECISION AND ORDER

Based upon the foregoing, the Tax Commission orders Respondent to issue to Petitioner a

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refund of sales tax paid in the principal amount of \$\$\$\$\$. It is so ordered.

DATED this _____ day of _____, 2007.

Jane Phan
Administrative Law Judge

BY ORDER OF THE UTAH STATE TAX COMMISSION:

The Commission has reviewed this case and the undersigned concur in this decision.

DATED this _____ day of _____, 2007.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

Notice of Appeal Rights: You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Tax Commission Appeals Unit pursuant to Utah Code Ann. Sec. 63-46b-13. A Request for Reconsideration must allege newly discovered evidence or a mistake of law or fact. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Sec. 59-1-601 et seq. and 63-46b-13 et seq.

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